853.04 (3) of the statutes is repealed and recreated to read:

853.04 **(3)** EFFECT OF AFFIDAVIT. The effect of an affidavit in substantially the form under sub. (1) or (2) is as provided in s. 856.16.

Committee Note

Creates cross reference to new location of provisions regarding the effect of a properly executed affidavit regarding a will execution. The provisions are relocated to Chapter 856, which deals with the opening of estates.

853.11 (2) of the statutes is renumbered 853.12, and 853.12 (1), (2) (intro.), (b) and (c), (3) (intro.) and (4) (intro.) and (b), as renumbered, are amended to read:

853.12 **(1)** ENTITLEMENT OF SURVIVING SPOUSE. Subject to ~~par. (c)~~ sub. (3), if the testator married the surviving spouse after the testator executed his or her will, the surviving spouse is entitled to a share of the probate estate.

(2) VALUE OF SHARE. (intro.) The value of the share under ~~par. (a)~~ sub. (1) is the value of the share that the surviving spouse would have received had the testator died with an intestate estate equal to the value of the testator's net estate ~~of the decedent less~~, but the value of the net estate shall first be reduced by the value of all of the following:

(b) All devises to or for the benefit of the issue of a child described in ~~subd. 1.~~ par. (a).

(c) All devises that pass under s. 854.06, 854.07, 854.21, or 854.22 to or for the benefit of children described in ~~subd. 1.~~ par. (a) or issue of those children.

(3) EXCEPTIONS. (intro.) ~~Paragraph (a)~~ Subsection (1) does not apply if any of the following applies:

(4) PRIORITY AND ABATEMENT. (intro.) In satisfying the share provided by this ~~subsection~~ section:

(b) Devises other than those described in ~~par. (b) 1. to 3.~~ sub. (2) (a) to (c) abate as provided under s. 854.18.

Committee Note

Relocates provisions regarding the rights of a surviving spouse when the testator executed his or her will before marriage, and did not amend it after marriage. The change to the intro. clarifies that the net estate is reduced by the value of the transfers to issue before the surviving spouse's hypothetical intestate share is calculated.

The provisions are currently located in § 853.11 (the section on revocation of wills), but that location is inappropriate because the provisions do not revoke the will but instead

reduce the share of some beneficiaries if certain requirements are met. Due to drafting conventions, the bill does not show that the title of § 853.12 is PREMARITAL WILL, and the bill does not show the content of current §853.11(2)(b)1, now renumbered 853.12(2)(a).

853.11 (2m) of the statutes is created to read:

853.11 **(2m)** PREMARITAL WILL. Entitlements of a surviving spouse under a decedent's will that was executed before marriage to the surviving spouse are governed by s. 853.12.

Committee Note

Creates cross reference to new location of provisions regarding the rights of a surviving spouse under a premarital will.

853.11 (3) of the statutes is amended to read:

853.11 **(3)** ~~FORMER~~ TRANSFER TO FORMER SPOUSE. ~~The effect of a~~ A transfer under a will to a former spouse is governed by s. 854.15.

Committee Note

Clarifies content of cross reference. Note that even though this cross reference is located in the section on revocation, the provisions in § 854.15 do not revoke the will. They do, however, revoke transfers to the former spouse or relatives of the former spouse if certain requirements are met.

853.11 (6) (c) of the statutes is amended to read:

853.11 **(6)** (c) If a subsequent will that wholly or partly revoked a previous will is itself revoked by another, later will, the previous will or its revoked part remains revoked, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent that it appears from the terms of the later will, or from the testator's contemporary or subsequent declarations, that the testator intended the previous will or its revoked part to take effect.

Committee Note

Nonsubstantive editing.

853.11 (6) (d) of the statutes is amended to read:

853.11 **(6)** (d) In the absence of an original valid will, ~~establishment of~~ the execution and validity of the revived will or part ~~is governed by~~ may be established as provided in s. 856.17.

Committee Note
Nonsubstantive editing.

853.18 (1) of the statutes is renumbered 853.18 (1) (intro.) and amended to read:

853.18 **(1)** (intro.) Except as otherwise provided in s. 853.15 or 853.17 (1) or ch. 766, ~~no written designation in accordance with the terms of any insurance, annuity or endowment contract, or in any agreement issued or entered into by an insurance company in connection therewith, supplemental thereto or in settlement thereof, and no written designation made under a contract, plan, system or trust providing for pension, retirement, deferred compensation, stock bonus, profit-sharing or death benefits, or an employment or commission contract, of any person to be a beneficiary, payee or owner of any right, title or interest thereunder upon the death of another, or any assignment of rights under any of the foregoing,~~ none of the following is subject to or defeated or impaired by any statute or rule of law governing the transfer of property by will, gift, or intestacy, even though ~~that~~ the designation or assignment is revocable or the rights of ~~that~~ the beneficiary, payee, owner, or assignee are otherwise subject to defeasance~~:~~.

853.18 (1) (a), (b) and (c) of the statutes are created to read:

853.18 **(1)** (a) A written designation in accordance with the terms of any insurance, annuity, or endowment contract.

(b) Any agreement issued or entered into by an insurance company supplemental to or in settlement of any insurance, annuity, or endowment contract.

(c) Any written designation made under a contract, plan, system, or trust providing for pension, retirement, deferred compensation, stock bonus, profit-sharing, or death benefits, or an employment or commission contract, of any person to be a beneficiary, payee, or owner of any right, title, or interest thereunder upon the death of another, or any assignment of rights under any of the foregoing.

Committee Note
The additional cross references in the "except as otherwise provided" clause at the beginning of the statute clarify that § 853.18 is not intended to contravene the provisions of §§ 853.15 (which provides for an equitable election if the will attempts to dispose of property belonging to a beneficiary) or 853.17(1) (regarding the effect of

a will provision that purports to change the beneficiary of a life insurance policy or annuity). The amendment is consistent with the decision in *Estate of Habelman*, 145 Wis. 2d 228, 426 N.W.2d 363 (Ct. App. 1988), which held that the phrase "statute governing the transfer of property by will" in current § 853.18(1) refers to statutes establishing formalities for the execution of a valid will.

The remaining changes to the statute reformat the list of instruments that are not "subject to or defeated or impaired by" statutes or rules that would limit the validity of nonprobate transfers. No substantive changes are intended by the reorganization of the statute.

-- Requested post P8 –

853.25 Unintentional failure to provide for issue of testator. (1) Children born or adopted after making of the will.

(2) Living issue omitted by mistake. (a) Except as provided in sub. (5), if clear and convincing evidence proves that the testator failed to provide in the testator's will for a child living at the time of making of the will, or for the issue of any then deceased child, by mistake or accident, including the mistaken belief that the child or issue of a deceased child was dead at the time the will was executed, the child or issue is entitled to receive a share in the estate of the testator~~, as provided under sub. (1),~~ as if the child or issue was born or adopted after the execution of the will, as follows:

1. If no children were included in the will but some or all of those children were omitted by mistake, then the share of any child or issue omitted by mistake is as provided under sub. (1)(b).

2. If some children were included in the will but other children were omitted by mistake, then the share of any child or issue omitted by mistake is as provided under sub. (1)(c).

(b) Failure to mention a child or issue in the will is not in itself evidence of mistake or accident.

Committee Note:

-- Requested post P8 – Clarifies cross reference to sub. (1), which provides for children born or adopted after execution of the will. The revised statute clarifies that treatment of living children omitted by mistake is parallel to the treatment of after-born or after-adopted children under sub. (1).

853.32 (1) of the statutes is renumbered 853.32 (1) (am).

853.32 (1) (bm) of the statutes is created to read:

853.32 **(1)** (bm) A writing or document is incorporated into a will under par. (am) even if the writing or document is not executed in compliance with s. 853.03 or 853.05.

Committee Note

Clarifies that even though § 851.31 defines a will to include "any document incorporated by reference ... under s. 853.32 (1) or (2)," the incorporated document does not need to be executed according to will formalities, as long as the other requirements are met.

853.32 (2) (a) of the statutes is amended to read:

853.32 **(2)** (a) A reference in a will ~~executed on or after May 3, 1996,~~ to another document that lists tangible personal property not otherwise specifically disposed of in the will disposes of that property if the other document describes the property and the distributees with reasonable certainty and is signed and dated by the decedent. The court may enforce a document that is not dated but that fulfills all of the other requirements under this paragraph.

Committee Note

Section 853.32(2) allows transfer of tangible personal property without will formalities if certain requirements are met. The amendment removes the provision limiting application of this statute to transfers by decedents whose will was executed on or after May 3, 1996.

Note, however, that wills executed in Wisconsin before May 3, 1996, probably included language that merely requested—rather than *required*—that property be distributed in accordance with the list. Thus, the amendment will likely have little effect on wills drafted in Wisconsin prior to May 3, 1996. Instead, it is likely that the amendment will primarily affect Wisconsin probate of a will written in another jurisdiction, before May 3, 1996, which included binding language because of the existence of a similar statute in that other jurisdiction at the time the will was executed.

The amendment also removes the absolute requirement that the separate statement regarding tangible personal property be dated. The purpose of the dating requirement is to settle disputes when there is more than one tangible personal property statement. If there is only one document, if there are multiple documents that are not fundamentally inconsistent, or if there are multiple documents but the time order can

be inferred, then it makes sense to allow the court to enforce those documents even if they are not dated.

853.32 (2) (am) of the statutes is created to read:

853.32 **(2)** (am) Another document under par. (a) is valid if it was signed in compliance with s. 853.03 (1) or with the law of the place where the document was signed, or where the testator resided, was domiciled, or was a national at the time the document was signed or at the time of death, even if it was not otherwise executed in compliance with s. 853.03 (2) or 853.05.

Committee Note

Clarifies that the *signing* procedure for a "tangible personal property" statement is the same as for a will – for example assisted signing and signing by another on direction of the testator are permitted under § 853.03(1). Also clarifies that even though § 851.31 defines a will to include "any document incorporated by reference in a testamentary document under s. 853.32 (1) or (2)," other will execution requirements under §§ 853.03(2) or 853.05 – such as the witnessing requirement – do not apply to the statement disposing of tangible personal property.

853.32 (2) (b) of the statutes is renumbered 853.32 (2) (b) (intro.) and amended to read:

853.32 **(2)** (b) (intro.) Another document under par. (a) is valid even if ~~it~~ any of the following applies:

1. The document does not exist when the will is executed~~, even if it~~.

2. The document is changed after the will is executed~~ and even if it~~.

3. The document has no significance except for its effect on the disposition of property by the will.

Committee Note

Nonsubstantive editing. Note that § 853.32(2) does not require that the separate statement regarding tangible personal property be executed after the will; it can be executed at the same time as the will or prior to the will, as long as the intent to incorporate it is clear. If it is executed at the same time as or prior to the will and is not changed subsequently, then it would also qualify as a document incorporated by reference under § 853.32(1).

854.01 of the statutes is renumbered 854.01 (intro.) and amended to read:

854.01 ~~Definition~~ Definitions. (intro.) In this chapter~~, "governing:~~

(2) "Governing instrument" means a will; a deed; a trust instrument; an insurance or annuity policy; a contract; a pension, profit-sharing, retirement, or similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an instrument that creates or exercises a power of appointment; or any other dispositive, appointive, or nominative instrument that transfers property at death.

Committee Note
Renumbering to accommodate definition of extrinsic evidence in § 854.01(1).

854.01 (1) of the statutes is created to read:

854.01 **(1)** "Extrinsic evidence" means evidence that would be inadmissible under the common law parol evidence rule or a similar doctrine because the evidence is not contained in the governing instrument to which it relates.

Committee Note
Creates a definition for "extrinsic evidence" for use in Chapter 854.

Various subsections of Chapter 854 provide that extrinsic evidence can be used for construction of the intent of the person who executed a governing instrument. These provisions are not meant to change unrelated rules that admit or exclude evidence, such as privilege or the Deadman's Statute. They do, however, change the special rule of evidence that sometimes applies in trusts and estates matters, which would require that interpretative evidence be limited to that which can be found within "the four corners of the document."

Note that to be relevant, the contrary intent of the person who executed a governing instrument does not necessarily need to exist at the time that instrument is executed. See, e.g., the discussion in *Restatement 3d of Property*, § 10.2, Comment G.

854.01(3) [definition of "revocable"]

Committee Note
Under 1997 Act 188, there are definitions of "revocable provision" at §§ 854.06(1)(b) and 854.15(1)(e). Those definitions are consolidated at new § 854.01(3) by repealing current § 854.06(1)(b) and amending and renumbering current § 854.15(1)(e). Due to drafting conventions, the bill creates the new provision as an amendment to § 854.15(1)(e), not as a change to § 854.01. A parallel definition of revocable trust is created at § 701.115.

As amended and renumbered, § 854.01(3) provides as follows:

854.01 (3) "Revocable," with respect to a disposition, provision, or nomination, means one under which the decedent, at the time referred to, was alone empowered, by law or under the governing instrument, to change or revoke, regardless of whether the decedent was then empowered to designate himself or herself in place of a former designee, and regardless of whether the decedent then had the capacity to exercise the power.

854.03 (2) (b) of the statutes is amended to read:

854.03 **(2)** (b) Except as provided in sub. (5), if property is transferred under a governing instrument that establishes 2 or more co-owners with right of survivorship, and if ~~it is not established that~~ at least one of the co-owners ~~survived~~ did not survive the others by at least 120 hours, the property is transferred to the co-owners in proportion to their ownership interests.

Committee Note
Nonsubstantive editing.

854.03 (5) of the statutes is renumbered 854.03 (5) (am), and 854.03 (5) (am) 4., as renumbered, is amended to read:

854.03 **(5)** (am) 4. The imposition of a 120-hour survival requirement would cause a nonvested property interest or a power of appointment to fail to be valid, or to be invalidated, under s. 700.16 or under the rule against perpetuities of the applicable jurisdiction.

Committee Note
Nonsubstantive editing.

854.03 (5) (am) 7. of the statutes is created to read:

854.03 **(5)** (am) 7. The statute or governing instrument specifies that this statute, or one similar to it, does not apply.

Committee Note
Clarifies that a provision in a governing instrument stating that the Wisconsin statute (or other statute providing for a required period of survivorship) does not apply is effective to abrogate the provisions of § 854.03. Nonetheless, a drafter should not merely provide that the statute "does not apply." Instead, a drafter should provide

either (1) that if the order of death cannot be conclusively determined, one of two or more people shall be deemed to be the survivor, or (2) that a period of survivorship longer than 120 hours is required. The purpose of § 854.03 is to implement the intent of the transferor, and the Drafting Committee intends that the statute be easy to abrogate.

-- Requested post P8 – [am]8 pulled
-- Requested post P8 – change to [am]9

854.03 (5) (am) 9. of the statutes is created to read:

854.03 **(5)** (am) 9. The imposition of a 120-hour survival requirement would be administratively cumbersome and would not change the identity of the ultimate beneficiaries of the property or the property that each beneficiary would receive.

Committee Note

Provides an exception to the 120-hour survivorship requirement for unusual situations where the requirement would be administratively cumbersome and no benefit would be gained by imposing the requirement. An example, based on a case called to the attention of the Drafting Committee, is a situation where husband and wife hold all virtually all their property as survivorship marital property, have wills with identical provisions and beneficiaries, die within 120 hours of each other, and the combined value of all their property is such that there will be no estate tax. Under § 854.03(2)(b), the survivorship marital property would be severed and two probates would be necessary in order to get the property to the probate beneficiaries. Under the new exception, the spouse who physically survived would receive all the survivorship property, and it would then pass to the beneficiaries under that spouse's will.

The Drafting Committee intends that this provision be an option rather than a requirement. It should only be invoked when no benefit would be gained by imposing the requirement of 120-hour survivorship. In the example in the preceding paragraph, assume that Husband and Wife hold $1.2 million of survivorship marital property, and no other assets. While imposition of the 120-hour survivorship requirement would be "administratively cumbersome," it would also avoid payment of Wisconsin estate tax. (Under current law, estates valued at up to $675,000 are exempt from Wisconsin estate tax, and application of the 120-hour rule would yield tax-free estates of $600,000 each.) Thus, the conditions of § 854.03(5)(am)9. are not met, because impostion of the 120-hour survivorship requirement *would* change the property that each beneficiary would receive – some of the property would go to the tax collector instead.

854.03 (5) (bm) of the statutes is created to read:

854.03 **(5)** (bm) If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

Committee Note

Broadens and relocates current § 854.03 (7). Provides that if the transfer is under a governing instrument, extrinsic evidence may be used to construe the transferor's intent regarding the survivorship requirement, irrespective of whether that evidence relates to interpretation of the governing instrument itself. In general, the remaining provisions of sub. (5) may be understood as specific examples of the demonstration of contrary intent. Current sub. (7) is repealed because it is no longer necessary.

Note that if the transfer was made under a governing instrument, the person who executed the instrument may have had an intent contrary to one or more particular provisions in the statute, rather than contrary to the statute as a whole. Examples of how this might apply are included in the Note to § 854.20.

854.03 **(7)** of the statutes is repealed.

Committee Note

See note to § 854.03(5)(bm)

854.035 of the statutes is created to read:

-- Requested post P8 -- drop provision

854.04 (1) (a) of the statutes is amended to read:

854.04 **(1)** (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person "by representation~~",~~" "by right of representation," or "per stirpes~~",~~" the property is divided into equal shares for the designated person's surviving children ~~of the designated person~~ and for the designated person's deceased children who left surviving issue. Each surviving child and each deceased child who left surviving issue are allocated one share.

Committee Note

Clarifies awkward construction in current statute, which seems to create a share for a predeceased child who left no issue, and then take the share away.

854.04 (3) (a) of the statutes is amended to read:

854.04 **(3)** (a) Except as provided in subs. (5) and (6), if a statute or a governing instrument calls for property to be distributed to the issue or descendants of a designated person "per capita at each generation~~",~~," the property is divided into equal shares at the generation nearest to the designated person that contains one or more surviving issue. Each survivor in that generation ~~is~~ and each deceased person in that generation who left surviving issue are allocated one share~~, and the~~. The shares of the deceased persons in that same generation who left surviving issue are combined for ~~distribution~~ allocation under par. (b).

Committee Note:
Clarifies awkward construction in current provision, which combines the shares of predeceased people who left issue but does not formally create those shares. Clarifies that shares are allocated, rather than "distributed," by the definition in the statute.

854.04 (4) of the statutes is amended to read:

854.04 **(4)** PER CAPITA. Except as provided in sub. (6), if a statute or governing instrument calls for property to be distributed to a group or class "per capita", the property is divided into as many shares as there are surviving members of the group or class, and each member ~~receives~~ is allocated one share.

Committee Note:
Clarifies that shares are allocated, rather than distributed, by the definition in the statute.

854.04 (5) (intro.) of the statutes is amended to read:

854.04 **(5)** CERTAIN INDIVIDUALS DISREGARDED. (intro.) For the purposes of ~~this section~~ subs. (1) to (3), all of the following apply:

Committee Note:
Clarifies that sub. (5)(b) – reprinted, as amended, below – is not meant to apply to sub. (4), which defines a "per capita" distribution. A person who is included in a per capita—i.e. "per person"—distribution may or may not be an ancestor of another person who is also included. For example, a distribution to "my descendants, per capita" means that *each* surviving descendant receives a share – if multiple generations of descendants survive, then members of each generation would count equally.

As amended, § 854.04(5) will read:

(5) CERTAIN INDIVIDUALS DISREGARDED. For the purposes of sub. (1) - (3), all of the following apply:
(a) An individual who is deceased and who left no surviving issue is disregarded.
(b) An individual who has a surviving ancestor who is an issue of the designated person is not allocated a share.

With the amendment to sub. (5)(intro), sub. (5)(a) does not apply to the definition of per capita distribution in § 854.04(4). But note that sub. (4) itself includes a survivorship requirement (the property is divided into as many shares as there are *surviving* members of the group or class), in the absence of evidence of contrary intent under sub. (6).

854.04 (5) (b) of the statutes is amended to read:

854.04 (5) (b) An individual who has a surviving ancestor who is an issue of the designated person is not ~~entitled to~~ allocated a share.

Committee Note:
Clarifies that shares are allocated, rather than distributed, by the definition in the statute.

854.04 (6) of the statutes is amended to read:

854.04 **(6)** CONTRARY INTENT. ~~This section does not apply if~~ If the transfer is made under a governing instrument and ~~there is a finding of contrary intent of~~ the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe ~~that~~ the intent.

Committee Note:
Clarifies that if the transfer is made under a governing instrument, the person who executed the instrument may have had an intent contrary to one or more particular provisions in the statute, rather than contrary to the statute as a whole. Examples of how this might apply are included in the Note to § 854.20.

854.05 (5) of the statutes is renumbered 854.05 (5) (a) and amended to read:

854.05 **(5)** (a) ~~This section does not apply to the extent that a~~ If the person who executed the governing instrument~~, either expressly or as construed from extrinsic~~ had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence~~, provides otherwise~~ may be used to construe the intent.

(b) A general directive to pay debts does not give rise to a presumption of exoneration.

Committee Note

Clarifies that contrary intent regarding the rule of construction for exoneration of encumbered property in § 854.05 does not have to be indicated in the governing instrument. Also clarifies that the person who executed the governing instrument may have had an intent contrary to one or more particular provisions in the statute, rather than contrary to the statute as a whole. Examples of how this might apply are included in the Note to § 854.20.

The amendment also separates the provision stating that a general directive to pay debts does not give rise to a presumption of exoneration, in order to make it more visible.

854.06 (1) (b) of the statutes is repealed.

Committee Note

Under 1997 Act 188, there are definitions of "revocable provision" at §§ 854.06(1)(b) and 854.15(1)(e). Those definitions are now consolidated at new § 854.01(3) by repealing current § 854.06(1)(b) and amending and renumbering current § 854.15(1)(e). See also note to § 854.01(3).

Multiple changes to § 854.06(4), "contrary intent" related to the provisions protecting the issue of certain predeceased beneficiaries (also known as "antilapse" provisions).

854.06 (4) (a) of the statutes is renumbered 854.06 (4) (a) (intro.) and amended to read:

854.06 **(4)** (a) (intro.) ~~This section~~ Subsection (3) does not apply if ~~there is a finding of contrary intent of the decedent~~ any of the following applies:

(bm) If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe ~~that~~ the intent.

854.06 (4) (a) 1. of the statutes is created to read:

854.06 **(4)** (a) 1. The governing instrument provides that a transfer to a predeceased beneficiary lapses.

854.06 (4) (b) of the statutes is renumbered 854.06 (4) (a) 2. and amended to read:

854.06 **(4)** (a) 2. ~~If the~~ The governing instrument designates one or more persons, classes, or groups of people as contingent transferees, in which case those transferees take in preference to those under sub. (3). But if none of the contingent transferees survives, sub. (3) applies to the first group in the sequence

of contingent transferees that has one or more transferees specified in sub. (2) who left surviving issue.

Committee Note

Section 854.06(4) is reorganized and new subd. (4)(a)1. is added to take into account that the most common way for a transferor to indicate contrary intent to the "antilapse" rule is to specify that intent in the governing instrument. The amendments also clarify that the special rule for predeceased contingent beneficiaries in (4)(a)2. is subject to the "contrary intent" rule. Note that due to drafting conventions, the amended statute does not have a par. (b).

As amended and reorganized, the statute reads as follows:

> 854.06 (4) (a) Subsection (3) does not apply if any of the following applies:
> 1. The governing instrument provides that a transfer to a predeceased beneficiary lapses.
> 2. The governing instrument designates one or more persons, classes, or groups of people as contingent transferees, in which case those transferees take in preference to those under sub. (3). But if none of the contingent transferees survives, sub. (3) applies to the first group in the sequence of contingent transferees that has one or more transferees specified in sub. (2) who left surviving issue.
>
> (bm) If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

The operation of subd. (4)(a)2. can be seen in the following example: Assume that a governing instrument states, "I leave my property to A. If A does not survive, then I leave it to B; if B does not survive, I leave it to C." If in fact A does not survive, the default rule in sub. (3) does not apply, because the decedent has designated contingent beneficiaries. The same applies if A and B both do not survive. However, if A, B, and C all do not survive, then the default rule applies first to A. If A is not a covered beneficiary and/or if A does not have surviving issue, then the default rule applies to B, and so on.

Finally, the amendment to renumbered par. (4)(bm) clarifies that the person who executed the governing instrument may have had an intent contrary to one or more particular provisions in the statute, rather than contrary to the statute as a whole. Examples of how this might apply are included in the Note to § 854.20.

854.07 (3) of the statutes is amended to read:

854.07 **(3)** If a governing instrument other than a will does not effectively dispose of an asset that is governed by the instrument, that asset shall be paid or distributed to the ~~decedent's~~ transferor's probate estate.

Committee Note
Clarifies that in case of a lapse under a governing instrument created by someone other than the decedent (e.g. a trust created by a third party) the "decedent" referred to in the current statute is the transferor, not a named recipient of the transfer.

854.07 (4) of the statutes is amended to read:

854.07 **(4)** ~~This section does not apply if there is a finding of contrary intent of~~ If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe ~~that~~ the intent.

Committee Note:
Clarifies that the person who executed the governing instrument may have had an intent contrary to one or more particular provisions in the statute, rather than contrary to the statute as a whole. Examples of how this might apply are included in the Note to § 854.20.

Multiple Changes to § 854.08(5), relating to non-ademption of specific transfers under certain circumstances.

854.08 (5) (title) of the statutes is repealed and recreated to read:

854.08 **(5)** (title) Property under guardianship, conservatorship, or power of attorney.

854.08 (5) of the statutes is renumbered 854.08 (5) (b) and amended to read:

854.08 **(5)** (b) Subject to pars. (c) and (d) and sub. (6), if property that is the subject of a specific gift is sold or mortgaged by a guardian ~~or~~, conservator, or agent of the person who executed the governing instrument, or if a condemnation award or insurance proceeds are paid to a guardian ~~or~~, conservator, or agent, the specific beneficiary has the right to a general pecuniary transfer equivalent to the proceeds of the sale ~~or the~~, mortgage, condemnation award, or ~~the~~ insurance proceeds, reduced by any amount expended or incurred to restore or repair the property or to reduce the indebtedness on the mortgage, if the funds are available under the governing instrument. ~~This provision~~

(c) Paragraph (b) does not apply ~~if the person who executed the governing instrument~~ with respect to a guardian or conservator if, subsequent to the sale ~~or~~,

mortgage, award, or receipt of insurance proceeds, the person who executed the governing instrument is adjudicated competent and survives such adjudication for a period of one year; but in such event ~~a sale by a guardian or conservator within 2 years of that person's death is a sale by that person for purposes of sub. (2)~~ the rights of the specific beneficiary shall be determined as though the proceeds were paid to the owner under sub. (2), (3), or (4).

854.08 (5) (a) of the statutes is created to read:

854.08 **(5)** (a) In this subsection, "agent" means an agent under a durable power of attorney, as defined in s. 243.07 (1) (a).

854.08 (5) (d) of the statutes is created to read:

854.08 **(5)** (d) Paragraph (b) does not apply with respect to an agent if the person who executed the governing instrument is competent at the time of the sale, mortgage, award, or receipt of insurance proceeds but in such event the rights of the specific beneficiary shall be determined as though the proceeds were paid to the owner under sub. (2), (3), or (4).

Committee Note

Subsection title changed from "Sale or Loss of Property of an Incompetent" to reflect broadening of the subsection to provide for non-ademption in certain circumstances where an item was handled under a power of attorney.

Par. (a) adds definition of "agent," because coverage of the statute has been broadened to include an agent acting under a durable power of attorney.

Renumbered and amended par. (b) and (c) begin with the complete substance of current sub. 5. Par. (b) is amended to include actions by an agent under a durable power of attorney and to include coverage of the proceeds of a mortgage. It appears that this provision will provide relief in situations such as that in *Elrod v. Brommer*, 2001 WL 1491609 (Wis. Ct. App., unpubl.). Par. (c) is separated off, because it deals with an exception if a guardian or conservator was involved, and is amended to integrate with sub. (2), (3), and (4). Par. (c) is also amended to clarify the time order of events referred to in the statute. New par. (d) is added to deal with an exception if an agent under a durable power of attorney is involved.

If an action is taken by a guardian or conservator, the ward is presumed incompetent, and par. (c) covers the situation where the ward is adjudicated to have regained competency and survives for a year, during which the former ward has the opportunity to amend his or her estate plan. No parallel situation exists for an action taken by an agent under a durable power of attorney, because there is no determination of incompetency. If the principal is known or can be shown to have been competent at the time the agent made the transfer, or is known or can be shown to have been incompetent at the time but to have regained competency later, the action or inaction of the principal may be relevant to the consideration contrary intent under sub. (6).

As provided in s. _[Initial Applicability] of the bill, this provision is effective for persons who die on or after the effective date of the legislation.

854.08 (6) (a) (intro.) and 2. of the statutes are consolidated, renumbered 854.08 (6) (ag) and amended to read:

854.08 **(6)** (ag) This section is inapplicable if ~~any of the following applies:~~ ~~2. The~~ the person who executed the governing instrument gives property during the person's lifetime to the specific beneficiary with the intent of satisfying the specific gift. ~~Extrinsic evidence may be used to construe that intent~~ and the requirement under s. 854.09 (1) is satisfied.

Committee Note

Clarifies that § 854.09(1) is the governing rule regarding intent to satisfy a specific gift. Note that with this amendment, there will no longer be a par. (a) in this subsection; instead the paragraphs will be (ag), (ar), (b), and (c).

854.08 (6) (a) 1. of the statutes is renumbered 854.08 (6) (ar) and amended to read:

854.08 **(6)** (ar) ~~The~~ If the person who executed the governing instrument, ~~either expressly or as construed from extrinsic evidence, shows the~~ had an intent ~~that a~~ contrary to any provision in this section, then that provision is inapplicable to the transfer ~~fail under the particular circumstances~~. Extrinsic evidence may be used to construe the intent.

Committee Note

Clarifies that contrary intent regarding the non-ademption of specific gifts property in § 854.08 does not need to be indicated in the governing instrument.

Clarifies that the person who executed the governing instrument may have had an intent contrary to one or more particular provisions in the statute, rather than contrary to the statute as a whole. Examples of how this might apply are included in the Note to § 854.20.

Note that with this amendment, there will no longer be a par. (a) in this subsection; instead the paragraphs will be (ag), (ar), (b), and (c).

854.09 (3) of the statutes is amended to read:

854.09 **(3)** If the transferee fails to survive the person who executed the governing instrument, ~~the gift is treated as a full or partial satisfaction of the transfer~~ and his or her issue take a substitute transfer under intestacy or under a

governing instrument, the issue receive the same transfer that the named transferee would have received had the transferee survived, unless the transferor ~~has~~ declared otherwise in a document, either expressly or as construed from extrinsic evidence.

Committee Note

Amends provision regarding the effect of an advancement on transfers to the transferee's issue when the transferee who received the advancement predeceases the donor. The current rule, created by 1997 Act 188, seems to be harsher on the transferee's issue than was previous law, because it appears to presume that the gift to the deceased transferee would have been considered an advancement. The original Committee Note to § 854.09, however, states that § 854.09 was not intended to change prior Wisconsin law on this matter.

In reconsidering the matter, the Committee concluded that the best rule would be one that kept the issue of the transferee in the same position as the transferee would have been if he or she had survived unless the transferor declared otherwise in a document, either expressly or as construed from extrinsic evidence. Under the large majority of fact situations, this rule will give the same result as the pre-1999 statute.

In the amended provision, "a substitute transfer under intestacy or under a governing instrument" refers to issue of the transferee who take under intestacy, under § 854.06 (antilapse / predeceased beneficiary), under § 854.07 (failed transfer), or because of a substitute gift in the governing instrument.

854.11 (4) of the statutes is amended to read:

854.11 **(4)** CONTRARY INTENT. ~~This section does not apply if there is a finding of contrary intent of~~ If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe ~~that~~ the intent.

Committee Note:

Clarifies that the person who executed the governing instrument may have had an intent contrary to one or more particular provisions in the statute, rather than contrary to the statute as a whole. Examples of how this might apply are included in the Note to § 854.20.

-- Requested post P8 – pull 854.115

854.12 of the statutes is created to read:

854.12 Debt to transferor. (1) HEIR UNDER INTESTACY. (a) If an heir owes a debt to the decedent, the amount of the indebtedness shall be offset against the intestate share of the debtor heir.

(b) In contesting an offset under par. (a), the debtor heir shall have the benefit of any defense that would be available to the debtor heir in a direct proceeding by the personal representative for the recovery of the debt, except that the debtor heir may not defend on the basis that the debt was discharged in bankruptcy or on the basis that the relevant statute of limitations has expired. If the debtor fails to survive the decedent, the court may not include the debt in computing any intestate shares of the debtor's issue.

(2) TRANSFEREE UNDER REVOCABLE GOVERNING INSTRUMENT. (a) Subject to par. (c), if a transferee under a revocable governing instrument survives the transferor and is indebted to the transferor, the amount of the indebtedness shall be treated as an offset against the property to which the debtor transferee is entitled. The property not distributed to the debtor becomes part of the decedent's probate estate if it is not already. If multiple revocable governing instruments transfer property to the debtor, the debt shall be equitably allocated against the various instruments.

(b) Subject to par. (c), in contesting an offset under par. (a), the debtor shall have the benefit of any defense that would be available to the transferee in a direct proceeding for the recovery of the debt, except that the transferee may not defend on the basis that the debt was discharged in bankruptcy, unless that discharge occurred before the execution of the governing instrument, or on the basis that the relevant statute of limitations has expired. If the transferee fails to survive the decedent, the debt may not be included in computing the entitlement of alternate beneficiaries.

(c) If the person who executed the governing instrument had an intent contrary to any provision in this subsection, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

-- Requested post P8 – [no change to the committee note] **(2)** TRANSFEREE UNDER REVOCABLE GOVERNING INSTRUMENT. (a) Subject to par. (c), if a transferee under a revocable governing instrument survives the transferor and is indebted to the transferor, the amount of the indebtedness shall be treated as an offset against the property to which the debtor transferee is entitled. ~~The property not distributed to the debtor becomes part of the decedent's probate estate if it is not already.~~ If multiple revocable governing instruments transfer property to the debtor, the debt shall be equitably allocated against the various instruments.

(3) PROPERTY NOT DISTRIBUTED BECAUSE OF OFFSET. The property not distributed to the debtor becomes part of the residue of the entity that holds the debt. If

the debt is not held by an entity, then the property not distributed to the debtor becomes part of the residue of the decedent's probate estate.

Committee Note

Combines current §§ 852.12 and 863.15, which provide for treatment of debts owed by a recipient of property in testate and intestate estates respectively, into one set of provisions and extends the scope of coverage to all governing instruments. Resolves the contradictory provisions of the two statutes by adopting the rule of § 852.12, that in general the debtor cannot defend on the basis that the debt was discharged in bankruptcy. (An exception is made if the transfer to the debtor is under a governing instrument and the debt was discharged before the instrument was executed, on the assumption that the transferor knew about the discharge and chose to make the transfer anyway.) Also provides that expiration of the statute of limitations is not a defense. If the transfer is under a governing instrument, each provision of the statute yields to contrary intent. Examples of how this might apply are included in the Note to § 854.20.

The reporting of the "loan" on a gift tax return would constitute strong evidence of intent that the transaction originally was (or was transformed into) a gift. However, the failure to report the transaction for gift tax purposes does not by itself establish that no gift was intended.

The statute only provides an offset – it does not cause a debt that is otherwise uncollectible to suddenly become collectible in full. Instead, the transfer under intestacy or governing instrument is offset by the debt, up to the lower of the amount of the transfer or the amount of the debt. Since the offset only changes the pattern of distribution and does not add to the total amount available for distribution, the rule should have no effect on estate taxation.

The operation of the statute is illustrated by the following example: Ten years ago, A lent daughter B $1 million. B never repaid the loan and the statute of limitation has run. A dies leaving an estate of $1.5 million. For purposes of valuing A's estate at death, the loan is valued at $0. A's will leaves everything to her three children, B, C and D. A's will is silent on the loan and there is no evidence of A's intent contrary to the statute. B, C and D would each be entitled to $500,000 under the will, but because of the statute, B's $500,000 is offset by the loan. Therefore, C and D each receive $750,000.

If A's governing instrument is a trust rather than a will and the loan is not a trust asset, C and D would each receive $500,000 under the trust. B's offset of $500,000 would pass to A's probate estate. If B is a beneficiary of A's estate, the offset would continue to apply.

If the debt is due in the future, the Drafting Committee contemplates that there could be a discount for the time value of money. However there should be no discount for any anticipated uncollectibility.

Note that the primary use of the statute will be in situations where a debt was discharged in bankruptcy, the statute of limitations has expired, or the debt is uncollectible for some other reason. Otherwise, the fiduciary will simply reach agreement with the debtor as to how to handle the distribution and payment of the debt.

As provided in s. _[Initial Applicability] of the bill, this provision is effective for transfers by persons who die on or after the effective date of the legislation.

854.13 (title) of the statutes is amended to read:

854.13 (title) **Disclaimer <u>of transfers at death</u>.**

Committee Note

Clarifies that § 854.13 only provides for disclaimer of transfers at death. New § 700.27 provides for disclaimer of gifts made during the donor's lifetime.

854.13 (2) (a) of the statutes is renumbered 854.13 (2) (a) 2.

854.13 (2) (a) 1. of the statutes is created to read:

854.13 **(2)** (a) 1. In this paragraph, "person" includes a person who is unborn or whose identity is unascertained.

Committee Note

Clarifies that persons who are unborn or whose identity is unknown are included in the meaning of "person."

854.13 (2) (gm) of the statutes is created to read:

854.13 **(2)** (gm) *Disclaimer by trustee.* The trustee of a trust named as a recipient of property under a governing instrument may disclaim that property on behalf of the trust if the trust authorizes disclaimer by the trustee. If the trust does not authorize disclaimer by the trustee, the trustee's power to disclaim is subject to the approval of the court.

Committee Note

Clarifies that a trustee may disclaim property on behalf of the trust. If the trust instrument does not authorize disclaimer, the disclaimer is subject to approval of the

court. Moreover, even if the trust allows disclaimer, the trustee may wish to seek court approval.

854.13 (2) (h) of the statutes is amended to read:

854.13 **(2)** (h) *After death.* A person's right to disclaim survives the person's death and may be exercised by the person's personal representative or special administrator upon receiving approval from the court having jurisdiction of the person's estate after hearing upon notice to all persons interested in the disclaimed property, if the personal representative or special administrator has not taken any action ~~which~~ that would bar the right to disclaim under sub. ~~(11)~~ (11g).

Committee Note:
Amends cross reference.

854.13 (2) (i) of the statutes is created to read:

854.13 **(2)** (i) *Disclaimer of inter vivos transfers.* A person who is a recipient of property under an inter vivos governing instrument, as defined in s. 700.27 (1) (c), may disclaim the property as provided in s. 700.27.

Committee Note
Cross references provision for disclaimer of lifetime transfers.

854.13 (7) (title) of the statutes is amended to read:

854.13 **(7)** (title) Devolution ~~in general~~.

854.13 (7) (a) of the statutes is amended to read:

854.13 **(7)** (a) *In general.* ~~Unless the transferor of the property or donee of the power has otherwise provided~~ Subject to subs. (8), (9), and (10), unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the decedent ~~or before the effective date of the transfer under the governing instrument.~~ If the disclaimed interest is a remainder contingent on surviving to the time of distribution, the disclaimed interest passes as if the disclaimant had died immediately before the time for distribution. If the disclaimant is an appointee under a power exercised by a governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by a governing instrument, the disclaimed

property devolves as if the disclaimant had predeceased the donee of the power. ~~This paragraph is subject to subs. (8), (9) and (10).~~

Committee Note:
After a successful disclaimer, the disclaimed property "devolves" to an alternate taker. Paragraph 854.13(7)(a) provides that in general, the property will pass as though the disclaimant had predeceased the decedent or, depending on the type of transfer, had died before the effective date of the transfer.[1] Paragraphs (7)(bm) and (c) and subs. (8) through (10) deal with various special cases that can arise.

The person who created the transfer can provide a different devolution from that in the statute, and an amendment to para. (7)(a) clarifies that extrinsic evidence may be used to construe the governing instrument under which the transfer was made.

854.13 (7) (b) of the statutes is repealed.

Committee Note:
Current paragraph (7)(b) provides that a disclaimer "relates back" to the decedent's date of death or the effective date of the transfer. Following the lead of the Uniform Disclaimer of Property Interests Act, the "relating back" language is repealed because it is redundant. No substantive change is implied by the repeal.

854.13 (7) (bm) and (c) of the statutes are created to read:

854.13 **(7)** (bm) *Devolution to issue of the disclaimants.* Unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, if, by law or under the governing instrument, the issue of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time the disclaimed interest would have taken effect in possession or enjoyment, the disclaimed interest passes only to the issue of the disclaimant who survive when the disclaimed interest takes effect in possession or enjoyment.

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[1] Repeal of the language "or before the effective date of the transfer under the governing instrument" in the first sentence of par. (7)(a) is for clarification and is not a substantive change. The change is based on the language proposed in Hirsch, Adam J. and Gans, Richard R., "Perfecting Disclaimer Reform: Suggestions for a Revised Uniform Act," 31 *Estate Planning* 185 (April, 2004).

(c) Disclaimer of a devisable future interest. 1. In this paragraph, "devisable future interest" is a future interest that can be passed under the will of the person who holds the future interest.

2. If the disclaimed interest is a devisable future interest under the law governing the transfer, then the disclaimed interest devolves as if it were a nondevisable future interest.

Committee Note:

Paragraph (7)(bm) is based on the discussion in Hirsch, Adam J. and Gans, Richard R., "Perfecting Disclaimer Reform: Suggestions for a Revised Uniform Act," 31 *Estate Planning* 185 (April, 2004), text at notes 15-20.

Paragraph (7)(c) is based on the discussion in Hirsch, Adam J. and Gans, Richard R., "Disclaimer Reform: New Developments and Additional Reflections," 32 *Estate Planning* 16 (June 2005), text at notes 10-28.

Paragraph (7)(c) addresses the concern that some future interests are structured so that, if the person who holds the future interest dies before the time has come for the future interest to take effect, then the future interest is part of the person's probate estate. The logical consequence of this situation is that if a person disclaims such an interest, he or she would be able to control the outcome, because for the interest to "pass as though the disclaimant had predeceased," it would pass under the disclaimant's will – that is, it would be "devisable.."[2] The amendment remedies this problem by providing that even if a future interest ordinarily would be devisable, if it is disclaimed it is treated as though it were not devisable. This assures that the disclaimed interest will be out of the control of the disclaimant, which is necessary in order for the disclaimer to be effective under the federal gift tax provisions of IRC § 2518 .

854.13 (8) of the statutes is amended to read:

854.13 **(8)** DEVOLUTION OF DISCLAIMED INTEREST IN JOINT TENANCY. ~~A~~ Unless the decedent provided otherwise in a governing instrument, either expressly or as construed from extrinsic evidence, a disclaimed interest in a joint tenancy passes to the decedent's probate estate.

Committee Note

Clarifies that the devolution of a disclaimed interest in a joint tenancy may be changed by a governing instrument executed by the decedent, and that extrinsic evidence may

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[2] Section 851.065 defines "devise," when used as a noun, to mean "a testamentary disposition of any real or personal property by will."

be used to construe that governing instrument. The alternate provision will almost certainly be in a governing instrument other than the joint tenancy itself, most likely a will or a trust.

854.13 (9) of the statutes is amended to read:

854.13 **(9)** DEVOLUTION OF DISCLAIMED INTEREST IN SURVIVORSHIP MARITAL PROPERTY. ~~A~~ Unless the decedent provided otherwise in a governing instrument, either expressly or as construed from extrinsic evidence, a disclaimed interest in survivorship marital property passes to the decedent's probate estate.

Committee Note

Clarifies that the devolution of a disclaimed interest in survivorship marital property may be changed by a governing instrument executed by the decedent, and that extrinsic evidence may be used to construe that governing instrument. The alternate provision will almost certainly be in a governing instrument other than the joint tenancy itself, most likely a will or a trust.

854.13 (10) (title) of the statutes is repealed and recreated to read:

854.13 **(10)** (title) Acceleration of subsequent interests when preceding interest is disclaimed.

854.13 (10) of the statutes is renumbered 854.13 (10) (a) and amended to read:

854.13 **(10)** (a) *Subsequent interest not held by disclaimant.* Unless the governing instrument ~~creating the future interest manifests a contrary intent~~ provides otherwise, either expressly or as construed from extrinsic evidence, ~~a future~~ upon the disclaimer of a preceding interest, a subsequent interest not held by the disclaimant and limited to take effect in possession or enjoyment after the termination of the interest ~~which~~ that is disclaimed ~~takes~~ accelerates to take effect as if the disclaimant had died immediately before the ~~effective date of the governing instrument~~ time when the disclaimed interest would have taken effect in possession or enjoyment or, if the disclaimant is an appointee under a power exercised by a ~~governing instrument~~ power of appointment, as if the disclaimant had died before the effective date of the exercise of the power.

854.13 (10) (b) of the statutes is created to read:

854.13 **(10)** (b) *Subsequent interest held by the disclaimant.* Unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest held by the disclaimant does not accelerate.

Committee Note:
Changes title from "Devolution of disclaimed future interest" to clarify that sub. (10) is concerned with the acceleration of a future interest when a preceding interest is disclaimed, not the disclaimer of a future interest itself.[3] For example, sub. (10) applies when a beneficiary disclaims a life estate, and the question is what effect this should have on when the remainder beneficiary should receive his or her interest. Par. (a) states the general rule that unless the instrument of transfer provides otherwise, a subsequent interest "accelerates" to take effect immediately. The amendment clarifies that extrinsic evidence can be used to construe the instrument.

New par. (b) provides a different rule for a situation where the disclaimant is also the recipient of the subsequent interest. Consider for example, a situation where B receives an income interest to age 35, and then receives the remainder after the income interest terminates. B could disclaim the income interest but retain the right to receive the remainder, and under the rule of par. (a), the remainder would accelerate, thus defeating the probable intent of the transferor. Par. (b) provides that unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, the disclaimant in the example just described would have to wait until age 35 to receive the remainder interest.

Multiple changes to § 854.13(11):

854.13 (11) (title) of the statutes is repealed.

854.13 (11) (a) of the statutes is renumbered 854.13 (11g), and 854.13 (11g) (intro.) and (a), as renumbered, are amended to read:

854.13 **(11g)** ~~ACTIONS THAT BAR DISCLAIMER~~ BAR. (intro.) ~~A~~ Bars to a person's right to disclaim property ~~is barred by~~ include, but are not limited to, any of the following:

(a) The person's assignment, conveyance, encumbrance, pledge, or transfer of the property or a contract ~~therefor~~ for the assignment, conveyance, encumbrance, pledge, or transfer of the property.

854.13 (11) (b) of the statutes is renumbered 854.13 (11p), and 854.13 (11p) (title), as renumbered, is amended to read:

854.13 **(11p)** (title) EFFECT ~~UPON SUCCESSORS IN INTEREST~~ OF DISCLAIMER OR WAIVER.

Committee Note

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[3] Devolution of future interests is covered under sub. (7).

Current §854.13(11), titled "Bar," actually addresses two unrelated topics – actions that bar disclaimer, and the effect of a disclaimer (or of a waiver of the right to disclaim) on successors in interest. The amendments separate the current subsection into two separate subsections, sub. (11g), dealing with bar, and sub. (11p), dealing with the effect of disclaimer on successors in interest.[4]

As amended, former sub. (11) will read as follows:
(11g) BAR. Bars to a person's right to disclaim property include, but are not limited to, any of the following:

(a) The person's assignment, conveyance, encumbrance, pledge or transfer of the property or a contract for the assignment, conveyance, encumbrance, pledge or transfer of the property.

(b) The person's written waiver of the right to disclaim.

(c) The person's acceptance of the property or benefit of the property.

(11p) EFFECT OF DISCLAIMER OR WAIVER. The disclaimer or the written waiver of the right to disclaim is binding upon the disclaimant or person waiving and all persons claiming through or under him or her.

The edits to 854.13(11g) (intro.) clarify that disclaimer may be barred by other bodies of law, such as the law relating to bankruptcy or governmental benefits.

854.13 (12) (b) of the statutes is amended to read:

854.13 **(12)** (b) Any disclaimer that meets the requirements of section 2518 of the Internal Revenue Code, or the requirements of any other federal law relating to disclaimers, constitutes an effective disclaimer under this section or s. 700.27.

Committee Note
Clarifies that any disclaimer that meets the relevant federal tax provisions is valid under Wisconsin property law, either under this section or under the provisions for disclaimer of lifetime transfers.

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[4] Due to drafting conventions, these changes are shown as the repeal of the original title, and as the "elevation" of the amended paragraph titles to become subsection titles. Renumbered par. (11g)(a) is also edited for clarity; the amendment is nonsubstantive. Also due to drafting conventions, the actual provisions of sub. (11g) and (11p) – except for (11g)(a) – are not shown in the bill. In addition, note that subsequent to the amendment there will no longer be a sub. (11).

854.14 (1) of the statutes is repealed.

Committee Note
Repeals limited definition of "disposition," which in the current version of § 854.14 (regarding consequences for a beneficiary who killed the decedent) is limited to "a transfer, including by appointment, of property or any other benefit to a beneficiary designated in a governing instrument or under a statute." The Drafting Committee concluded that the definition is unnecessary and could be interpreted as a limit on the general equitable power of the court provided in sub. (6)(a).

Note that due to drafting conventions, the amended section does not have a sub. (1) – the subsequent subsections are not renumbered.

854.14 (3m) of the statutes is created to read:

854.14 **(3m)** ADDITIONAL EFFECTS IF DEATH CAUSED BY SPOUSE. (a) *Definitions.* In this subsection:

1. "Owner" means a person appearing on the records of the policy issuer as the person having the ownership interest, or means the insured if no person other than the insured appears on those records as a person having that interest. In the case of group insurance, the "owner" means the holder of each individual certificate of coverage under the group plan and does not include the person who contracted with the policy issuer on behalf of the group, regardless of whether that person is listed as the owner on the contract.

2. "Ownership interest" means the rights of an owner under a policy.

3. "Policy" means an insurance policy insuring the life of a spouse and providing for payment of death benefits at the spouse's death.

4. "Proceeds" means the death benefit from a policy and all other economic benefits from it, whether they accrue or become payable as a result of the death of an insured person or upon the occurrence or nonoccurrence of another event.

(b) *Life insurance.* 1. Except as provided in sub. (6), if a noninsured spouse unlawfully and intentionally kills an insured spouse, the surviving spouse's ownership interest in a policy that designates the decedent spouse as the owner and insured, or in the proceeds of such a policy, is limited to a dollar amount equal to one-half of the marital property interest in the interpolated terminal reserve and in the unused portion of the term premium of the policy on the date of death of the decedent spouse. All other rights of the surviving spouse in the ownership interest or proceeds of the policy, other than the marital property interest described in this subsection, terminate at the decedent spouse's death.

2. Notwithstanding s. 766.61 (7) and except as provided in sub. (6), if an insured spouse unlawfully and intentionally kills a noninsured spouse, the ownership interest at death of the decedent spouse in any policy with a marital property component that designates the surviving spouse as the owner and insured is a fractional interest equal to one-half of the portion of the policy that was marital property immediately before the death of the decedent spouse.

(c) *Deferred employment benefits.* Notwithstanding s. 766.62 (5) and except as provided in sub. (6), if the employee spouse unlawfully and intentionally kills the nonemployee spouse, the ownership interest at death of the decedent spouse in any deferred employment benefit, or in assets in an individual retirement account that are traceable to the rollover of a deferred employment benefit plan, that has a marital property component and that is attributable to the employment of the surviving spouse is equal to one-half of the portion of the benefit or assets that was marital property immediately before the death of the decedent spouse.

(d) *Deferred marital property.* Except as provided in sub. (6), if the surviving spouse unlawfully and intentionally kills the decedent spouse, the estate of the decedent shall have the right to elect no more than 50 percent of the augmented deferred marital property estate, as determined under s. 861.02 (2), as though the decedent spouse were the survivor and the surviving spouse were the decedent. The court shall construe the provisions of ss. 861.03 to 861.11 as necessary to achieve the intent of this paragraph.

Committee Note

New sub. (3m) contains remedies that apply when the surviving spouse unlawfully and intentionally killed the decedent. These remedies apply in addition to those in sub (3). Par. (3m)(a) contains definitions, similar to those in § 766.61(1), having to do with marital property ownership of life insurance policies.

Subd. (3m)(b)1. clarifies the operation of the principles of §§ 854.14(2)(c) (revocation of "every statutory right or benefit to which the killer may have been entitled by reason of the decedent's death") and 854.14(4) ("wrongful acquisition of property by a killer not covered by this section shall be treated in accordance with the principle that a killer cannot profit from his or her wrongdoing") by specifying how these principles apply to the marital property component of life insurance policies insuring the *decedent spouse* on which the decedent spouse is designated as the "owner." ("Owner" is defined in subd. (a)1. as the person listed as the owner on the records of the insurance company.) If the surviving spouse has killed the decedent spouse, then the surviving spouse should be denied the benefit of the "flowering" of his or her interest in a policy

insuring the life of the decedent, who will typically be the "owner" of a policy insuring his or her life.[5]

Subd. (3m)(b)2 clarifies the operation of the principles of §§ 854.14(2)(c) and 854.14(4) by specifying how they apply to the decedent's interest in the marital property component of life insurance on the life of the *surviving spouse*'s life. (Under subd. (a)1, the surviving spouse will typically be designated as the "owner" of such a policy.) If the surviving spouse has killed the decedent spouse, then the decedent should not be divested of his or her ownership rights in a life insurance policy on the surviving spouse's life, as would ordinarily be the case under § 766.61(7).

Par. (3m)(c) clarifies the operation of the principles of §§ 854.14(2)(c) and 854.14(4) by specifying how they apply to the marital property component of deferred employment benefit plans held by the surviving spouse. If the surviving spouse has killed the decedent spouse, then the decedent should not be divested of his or her marital property interest in a deferred employment benefit plan held by the surviving spouse, as would ordinarily be the case under § 766.62(5). The amendment is consistent the result in *Estate of Hackl*, 231 Wis. 2d 43, 604 N.W.2d 579(Ct. App.1999), which was decided under the pre-1999 Code.

Par. (3m)(d) is similar to current § 861.02(8), and essentially reverses the operation of the deferred marital property election in the situation where the surviving spouse killed the decedent spouse. Section 861.02(8) has been repealed and replaced with a cross reference to the new provision.

854.14 (5) (a) of the statutes is amended to read:

854.14 **(5)** (a) A final judgment establishing criminal accountability for the unlawful and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section ~~and s. 861.02 (8)~~.

854.14 (5) (b) of the statutes is amended to read:

854.14 **(5)** (b) A final adjudication of delinquency on the basis of an unlawful and intentional killing of the decedent conclusively establishes the adjudicated individual as the decedent's killer for purposes of this section ~~and s. 861.02 (8)~~.

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[5] The "interpolated terminal reserve" referred to in subd.(3m) (b)1. is roughly equivalent to the value that the owner would receive if the policy were terminated.

Committee Note:
Removes cross references to § 861.02(8), because the core of that provision has been moved to new § 854.14(3m)(d). See note to § 854.14(3m)(d).

854.14 (5) (c) of the statutes is amended to read:

854.14 **(5)** (c) In the absence of a judgment establishing criminal accountability under par. (a) or an adjudication of delinquency under par. (b), the court, upon the petition of an interested person, shall determine whether, ~~under~~ based on the preponderance of the evidence ~~standard~~, the killing of the decedent was unlawful and intentional for purposes of this section ~~and s. 861.02 (8)~~.

Committee Note
Updates cross references and edits to conform to drafting conventions. Removes cross reference to § 861.02(8), because the core of that provision has been moved to new § 854.14(3m)(d). See note to § 854.14(3m)(d).

854.15 (1) (e) of the statutes is renumbered 854.01 (3) and amended to read:

854.01 **(3)** "Revocable~~",~~," with respect to a disposition, provision, or nomination, means one under which the decedent, at the time ~~of the divorce, annulment or similar event~~ referred to, was alone empowered, by law or under the governing instrument, to ~~cancel the designation in favor of the former spouse or former spouse's relative,~~ change or revoke, regardless of whether ~~or not~~ the decedent was then empowered to designate himself or herself in place of ~~the~~ a former ~~spouse or the former spouse's relative~~ designee, and regardless of whether ~~or not~~ the decedent then had the capacity to exercise the power.

Committee Note
Under 1997 Act 188, there are definitions of "revocable provision" at §§ 854.06(1)(b) and 854.15(1)(e). Those definitions are now consolidated at new § 854.01(3) by repealing current § 854.06(1)(b) and amending and renumbering current § 854.15(1)(e). See also note to § 854.01(3).

854.15 (5) (intro.) of the statutes is renumbered 854.15 (5) (am) (intro.).

854.15 (5) (a), (b), (c), (d) and (e) of the statutes are renumbered 854.15 (5) (am) 1., 2., 3., 4. and 5.

854.15 (5) (f) of the statutes is renumbered 854.15 (5) (bm) and amended to read:

854.15 **(5)** (bm) ~~There is a finding of the decedent's contrary~~ If the transfer is made under a governing instrument and the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is inapplicable to the transfer. Extrinsic evidence may be used to construe ~~that~~ the intent.

Committee Note:
Clarifies that if the transfer is made under a governing instrument, the person who executed the instrument may have had an intent contrary to one or more particular provisions in the statute relating to revocation of provisions in favor of a former spouse, rather than contrary to the statute as a whole. Examples of how this might apply are included in the Note to § 854.20.

854.17 of the statutes is amended to read:

854.17 ~~Classification; how determined~~ Marital property classification; ownership and division of marital property at death. ~~In chs. 851 to 882, classification~~ Classification of the property of a decedent spouse and surviving spouse ~~is~~, and ownership and division of that property at the death of a spouse, are determined under ch. 766 and s. 861.01.

Committee Note
Clarifies cross references.

854.18 (1) (a) (intro.) of the statutes is amended to read:

854.18 **(1)** (a) (intro.) Except as provided in sub. (3) or in connection with the ~~share of the surviving spouse who elects to take an elective share in deferred marital property~~ deferred marital property elective share amount of a surviving spouse who elects under s. 861.02, ~~a~~ the share of a surviving spouse who takes under s. ~~853.11 (2)~~ 853.12, or ~~a~~ the share of a surviving child who takes under s. 853.25, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

Committee Note

Conforms language to wording used in § 861.02(1), which provides that the surviving spouse's deferred marital property right is to elect an amount – he or she can not elect a "share" of specific property. Updates cross references.

854.18 (3) of the statutes is amended to read:

854.18 **(3)** If the governing instrument expresses an order of abatement, or if the ~~decedent's~~ transferor's estate plan or the ~~express or implied~~ purpose of the transfer, as expressed, implied, or construed through extrinsic evidence, would be defeated by the order of abatement under sub. (1), the shares of the distributees abate as necessary to give effect to the intention of the transferor.

Committee Note

Clarifies that for purposes of the abatement rules, the transferor may not be the decedent (for example the transfer may be under a power of appointment exercised under someone else's plan), that the purpose of the transfer does not have to be indicated in a governing instrument, and that extrinsic evidence may be used to show the purpose of the transfer.

Multiple changes to § 854.20.

854.20 (1) of the statutes is renumbered 854.20 (1) (a) and amended to read:

854.20 **(1)** (a) Subject to par. (b) and sub. ~~(4)~~ (5), a legally adopted person is treated as a birth child of the person's adoptive parents and the adoptive parents are treated as the birth parents of the adopted person for purposes of ~~intestate succession by~~ transfers at death to, through, and from the adopted person and for purposes of any statute or other rule conferring rights upon children, issue, or relatives in connection with the law of intestate succession or governing instruments.

854.20 (2) (intro.) of the statutes is renumbered 854.20 (2) (am) (intro.) and amended to read:

854.20 **(2)** (am) (intro.) Subject to sub. ~~(4)~~ (5), a legally adopted person ceases to be treated as a child of the person's birth parents and the birth parents cease to be treated as the parents of the child for the ~~same~~ purposes ~~as under~~ specified in sub. (1) (a), except:

854.20 (2) (a) of the statutes is renumbered 854.20 (2) (am) 1. and amended to read:

854.20 **(2)** (am) 1. If ~~a birth parent marries or remarries and~~ the parent-child relationship between the child ~~is adopted by the stepparent,~~ and one birth parent is replaced by adoption, but the relationship to the other birth parent is

not replaced, then for all purposes the child ~~is~~ continues to be treated as the child of the birth parent whose ~~spouse adopted the child~~ relationship was not replaced.

854.20 (2) (am) 2. b. and c. of the statutes are created to read:

854.20 **(2)** (am) 2. b. Subd. 2. a. applies only if the adopted person was a minor at the time of adoption or if the adoptive parent raised the adopted person in a parent-like relationship beginning on or before the child's 15th birthday and lasting for a substantial period or until adulthood.

c. Subdivision 2. a. does not apply if the parental rights of the deceased birth parent had been terminated.

854.20 (2) (b) of the statutes is renumbered 854.20 (2) (am) 2. a. and amended to read:

854.20 (2) (am) 2. a. ~~If~~ Subject to subd. 2. b. and c., if a birth parent of a ~~marital~~ child born to married parents dies and the other birth parent subsequently remarries and the child is adopted by the stepparent, the child ~~is~~ continues to be treated as the child of the deceased birth parent for purposes of ~~inheritance~~ transfers at death through that parent and for purposes of any statute or other rule conferring rights upon children, issue or relatives of that parent under the law of intestate succession or governing instruments.

854.20 (3) of the statutes is renumbered 854.20 (2) (bm) and amended to read:

854.20 **(2)** (bm) ~~*Sequential adoption.*~~ Subject to sub. ~~(4)~~ (5), if an ~~adoptive parent dies or his or her parental rights are terminated in a legal proceeding and the~~ adopted child is subsequently adopted by another person, the former adoptive parent is considered to be a birth parent for purposes of this ~~section~~ subsection.

854.20 (4) of the statutes is renumbered 854.20 (1) (b), and 854.20 (1) (b) (intro.) and 3., as renumbered, are amended to read:

854.20 **(1)** (b) ~~*Applicability.*~~ (intro.) ~~Subsections (1), (2) and (3) apply~~ Subject to sub. (5), par. (a) applies only if at least one of the following applies:3. The adoptive parent raised the adopted person ~~was raised as a member of the household by the adoptive parent from~~ in a parent-like relationship beginning on or before the child's 15th birthday ~~or before~~ and lasting for a substantial period or until adulthood.

854.20 (5) of the statutes is amended to read:

854.20 **(5)** CONTRARY INTENT. ~~This section does not apply if~~ If the transfer is made under a governing instrument and ~~there is a finding of contrary intent of~~ the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe that intent.